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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re A.O., a Person Coming
Under the Juvenile Court Law.

B292071

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK51842)

Plaintiff and Respondent,

v.

ROCHELLE G.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, D. Brett Bianco, Judge. Reversed and remanded with directions.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

Rochelle G.'s parental rights as to her daughter A.O. were terminated pursuant to section 366.26 of the Welfare and Institutions Code.¹ We conditionally reverse the termination order because the Department of Children and Family Services violated the notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA); and because the juvenile court failed to ensure compliance with these requirements and to make findings regarding the applicability of ICWA based on accurate and complete information.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2016, A.O. was born 14 weeks prematurely, and she tested positive for amphetamines at birth. Mother, who has an extensive substance abuse history and has been diagnosed with schizophrenia, bipolar disorder, and depression, admitted purchasing and using methamphetamine a few hours before going into labor. Mother had previously given birth to two premature, drug-exposed babies who died soon after birth. Mother's three other living children had been permanently removed from her custody.

A.O. was brought to the attention of the Department of Children and Family Services the day after she was born; she remained in neonatal intensive care for several months. On February 24, 2017, DCFS detained A.O. and filed a petition alleging that she came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). DCFS made three allegations under section 300, subdivision (b): (1) that Mother's substance abuse caused

¹ Unless otherwise indicated all further statutory references are to the Welfare and Institutions Code.

A.O.'s positive drug test after birth and endangered A.O.'s health and safety, placing her at risk of serious physical harm; (2) that due to her illicit drug use Mother was unable to provide regular care and supervision to A.O.; that Father Abraham O. failed to protect A.O. from Mother's drug abuse; and that the parents' conduct endangered A.O.'s health and safety and placed her at risk of serious physical harm; and (3) that Mother's mental and emotional problems left her unable to provide regular care to A.O., causing a risk of serious physical harm. Under section 300, subdivision (j), DCFS alleged that Mother's substance abuse had led to two of her other children becoming dependents of the juvenile court and receiving permanent placement services; that Mother continued to use illicit drugs, making her unable to care for A.O.; and that Mother's drug use and Father's failure to protect A.O. placed her at risk of serious physical harm, damage, and failure to protect. DCFS recommended that no family reunification services be provided to either parent.

The juvenile court² conducted the detention hearing on February 24, 2017. Mother was not present at the hearing because she was incarcerated. Father, who was present, denied any Native American ancestry on a Parental Notification of Indian Status form (ICWA-020). At the hearing, the juvenile court noted that it had received Father's form, and said, "He indicates that he has no Indian ancestry; therefore, the court can find that it has no reason to know that this is an I.C.W.A. case as to him." At this hearing, the juvenile court set the jurisdictional hearing for April 18, 2017.

² Judge Akemi Arakaki presided over the initial hearings in this matter.

Mother appeared at the arraignment hearing on March 3, 2017. That day, Mother completed a Parental Notification of Indian Status form on which she declared that to her knowledge she had no Native American ancestry. During the arraignment hearing, the court³ said, “I am in receipt of an I.C.W.A. 020 form from Mom. She indicates no Indian ancestry. Therefore, this court can find it has no reason to know this is an I.C.W.A. case.”

On March 23, 2017, Mother disclosed her possible Native American ancestry to DCFS. DCFS recorded that Mother said she might have “Blackfeet American Indian Heritage on behalf of her paternal side of her family.” According to DCFS, “The mother reported that she thinks her father has Blackfeet American Indian heritage only.”

DCFS sent ICWA notices on March 30, 2017. The ICWA notice form seeks information about the possible Indian child’s parents, grandparents, and great grandparents. Specifically, the form contains blank spaces into which DCFS enters, for each of these specified relatives, the name; current address; former address; birth date and place; tribe or band, and location; tribal membership or enrollment number, if known; and the date and place of death, if the relative is deceased. Although Mother had informed DCFS that her father was the family member believed to have Native American ancestry, DCFS completed the ICWA notice by indicating that every single relative of A.O., both maternal and paternal, was “Blackfeet Tribe of Montana.” DCFS listed Mother’s biological father, Keith G., as her biological mother. DCFS listed “Mary Ann W[.]” as one of Mother’s grandmothers. Contemporaneous DCFS reports state that Mary Ann W. actually was Mother’s mother, not her grandmother.

³ Judge Arakaki presided over this hearing.

Other than those two names and the Blackfeet designation, DCFS indicated that every other piece of information requested by the form about Mother's relatives was unknown. As to Father, except for the ubiquitous "Blackfeet Tribe of Montana" and the names of two of Father's purported grandparents, DCFS indicated that every other item of information called for by the form was unknown. The names provided for Father's grandparents were actually the names of his parents.

On April 18, 2017, the juvenile court⁴ continued the jurisdictional hearing to July 10, 2017, to allow further time for ICWA compliance.

On July 10, 2017, County Counsel requested a continuance of the jurisdictional hearing. Counsel explained, "It was brought to my attention that the notices attached regarding the Indian Child Welfare Act does not apply—are incorrect. Mother's biological mother is listed as Keith G[.] That[], in fact, is her father. And there is other information missing from these notices that Mother, according to her attorney, could provide; but she has not been interviewed by the Department regarding I.C.W.A." The juvenile court⁵ continued the adjudication to October 10, 2017. Additionally, the court ordered DCFS to interview A.O.'s parents about ICWA, to issue new ICWA notices, and to address ICWA in the next court report.

DCFS did not interview Mother until August 29, 2017. DCFS asserted in a later report that Mother "reported that her maternal grandmother, Mary Ann W[.] has possible Blackfeet

⁴ Judge Arakaki conducted this hearing.

⁵ Juvenile Court Referee Albert J. Garcia presided over this hearing.

Tribe ancestry.” Both the identification of Mary Ann W. as Mother’s grandmother and as Mother’s relative with Blackfeet ancestry contradicted information previously reported by DCFS, but it does not appear from the report that DCFS detected the contradiction, attempted to establish how Mother and Mary Ann W. were related, or tried to clarify the source of Mother’s Native American ancestry.

DCFS mailed new ICWA notices on September 1, 2017. In these notices DCFS now identified Mother’s father Keith G. as Father’s mother. DCFS also provided a different address for Mother, but the notices were identical to the prior notices in all other respects. Both parents and all of their relatives were identified as Blackfeet Tribe of Montana; Mother’s mother was misidentified as her grandmother; and no information was provided as to Mother’s father.

On October 10, 2017, the juvenile court⁶ continued the jurisdictional hearing because the delay in sending the second round of ICWA notices meant that the compliance process was not complete. The court apologized to the family and asked County Counsel the reason for the delay. County Counsel replied, “I don’t know, Your Honor. I didn’t speak to the D[ependency] I[nvestigator] today. I just saw the last minute. I don’t know if there was some reason why it took six weeks in between to talk to Mom.” The court continued the adjudication hearing to November 15, 2017, and ordered DCFS to submit a last minute information report addressing “any I.C.W.A. responses.”

⁶ Judge Arakaki conducted the hearing.

The juvenile court⁷ held the jurisdictional hearing on November 15, 2017. There is no reporter's transcript in the record for this hearing. The record on appeal does not include the last minute information report ordered by the juvenile court in advance of the November 15, 2017, jurisdictional hearing, and no such report is listed on the list of exhibits considered by the court at that hearing.

According to the minute order, Father was present for the jurisdictional hearing but Mother was not. Father signed a waiver of rights, and the court found Father's waivers to have been knowingly, intelligently, and voluntarily made. The court amended and sustained the allegations of the dependency petition. The court ordered visitation for Father but no reunification services for him, pursuant to section 361.5, subdivisions (b)(10) and (b)(11). As to Mother, the dispositional hearing was continued until January 22, 2018. The minute order from the hearing does not include ICWA findings, nor does it mention ICWA.

On January 22, 2018, the court⁸ conducted the dispositional hearing as to Mother. The court found by clear and convincing evidence that there were no reasonable means to protect A.O. without removing her from Mother. As with Father, the court ordered visitation but no reunification services for Mother, pursuant to section 361.5, subdivisions (b)(10) and (b)(11). The juvenile court set a permanent plan selection and

⁷ Judge Arakaki conducted this hearing.

⁸ Judge S. Patricia Spear presided over the dispositional hearing.

implementation hearing under section 366.26 for May 18, 2018.⁹ ICWA was not mentioned at the hearing or in the minute order from this date.

In advance of the May 18, 2018, hearing date, DCFS filed a report with the court in which it stated, “On 1/22/2018, Court found that the Indian Child Welfare Act does not apply.” On May 18, 2018, the juvenile court¹⁰ continued the section 366.26 hearing to July 20, 2018, at County Counsel’s request.

In its status review report for the July 20, 2018 permanent plan selection and implementation hearing, DCFS advised the court, “The Indian Child Welfare Act does not apply.” Neither the court nor the parties mentioned ICWA at the section 366.26 hearing. The juvenile court terminated both parents’ parental rights. Mother appeals.

DISCUSSION

ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8; *In re W.B.* (2012) 55 Cal.4th 30, 47.) For purposes of ICWA, an “Indian child” is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is eligible for membership in a

⁹ On this day, the court also imposed monetary sanctions against DCFS for failing to comply with court orders to provide Regional Center services to A.O.

¹⁰ Judge D. Brett Bianco presided over this hearing and the termination of parental rights hearing.

federally recognized tribe and is the biological child of a member of a federally recognized tribe. (25 U.S.C. § 1903(4) [definition of “Indian child”] & (8) [definition of “Indian tribe”]; see § 224.1, subd. (a) [adopting federal definitions].)

The juvenile court and DCFS have an affirmative duty to inquire whether the child named in the dependency petition is or may be an Indian child (former § 224.3, subd. (a))¹¹ [“The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings”]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470; Cal. Rules of Court, rule 5.481(a).)

Notice to the parent or Indian custodian and the Indian child’s tribe is required by ICWA in state court proceedings seeking foster care placement or termination of parental rights “where the court knows or has reason to know that an Indian child is involved.” (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child’s tribe, if DCFS or the court “knows or has reason to know that an Indian child is involved” in

¹¹ This provision was repealed and reenacted in 2018 as section 224.2, subdivision (a). (Stats. 2018, c. 833, §§ 5, 6.) Section 224.2, subdivision (a), provides, “The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, is or may be an Indian child. The duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child.”

the proceedings. (Former § 224.3, subd. (d), now § 224.2, subd. (a); see *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649-650; *In re Michael V.* (2016) 3 Cal.App.5th 225, 232; Cal. Rules of Court, rule 5.481(b)(1) [notice is required “[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480,” which includes all dependency cases filed under section 300].) Notice to Indian tribes is central to effectuating ICWA’s purpose, as it enables a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 8.)

When the court knows, or has reason to know that the proceedings involve an Indian child, DCFS must give notice by registered mail, return receipt requested, to the tribe of both the proceedings and the right to intervene. (25 U.S.C. § 1912(a); former § 224.2, subds. (a)-(d);¹² 25 C.F.R. § 23.11; 25 C.F.R. § 23.111.) Notices must be sent to all tribes of which the child may be a member or eligible for membership. (25 C.F.R. § 23.111(b)(1).) If the tribe is not known, notice must be given to the Secretary of the Interior. (25 U.S.C. § 1912(a).) Copies of the notice must also be sent to the appropriate regional director of the Bureau of Indian Affairs. (25 C.F.R. § 23.11(a)-(b).) The notice must include the petition and the following information, if known: the child’s name, birth date and birth place; the name of the tribe in which the child is enrolled or may be eligible to enroll; the names of the child’s mother, father, grandparents, great-grandparents, and any Indian custodians; those

¹² The notice requirements are now contained in section 224.3.

individuals' maiden, married, and former names as applicable, their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses. (25 C.F.R. § 23.111(a) & (d).)

There is no dispute that DCFS violated the inquiry and notice requirements of ICWA, and that the juvenile court failed in its responsibility to ensure compliance with those requirements and to make findings regarding the applicability of ICWA based on accurate and complete information. Indeed, after Mother filed her opening brief, County Counsel advised this Court that Mother's claims were meritorious and sought to stipulate for reversal of the judgment and remand to the juvenile court. We declined to accept the joint stipulation because it would disserve the public interest and be inconsistent with the goals of ICWA to permit such errors to be "corrected" by a stipulated reversal supported only by pro forma justifications, as opposed to a candid explanation as to how such errors occurred and what remedial measures have been implemented to prevent similar errors in the future.

A. Reason to Know A.O. May Be an Indian Child

Both parents initially denied Native American ancestry, and the juvenile court found that ICWA did not apply. However, only a few weeks later, Mother reported to DCFS that she believed that her father was of Blackfeet ancestry. Based on the information DCFS received from Mother on March 23, 2017, DCFS had reason to know that A.O. could be an Indian child. "The Indian status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the child is an Indian child." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.)

B. DCFS Breached Its Duties to Investigate and to Provide Accurate and Complete ICWA Notices, and It Misled the Juvenile Court

Once DCFS had reason to know that A.O. could be an Indian child, DCFS was required to make “further inquiry as soon as practicable by,” *inter alia*, “[i]nterviewing the parents, Indian custodian, and ‘extended family members’ . . . to gather the information” required to prepare complete ICWA notices. (Cal. Rules of Court, rule 5.481(a)(4).) There is no evidence in the record that DCFS satisfied its duty to investigate A.O.’s potential Native American ancestry and to gather the information required by ICWA and former section 224.2, subdivision (a)(5) (now section 224.3, subdivision (a)(5)). It does not appear that DCFS obtained any information about Mother’s ancestry besides her parents’ names and the name of the tribe to which she believed her father was related.

Not only was DCFS’s inquiry limited, but DCFS also made multiple errors in the ICWA notices it sent on March 30, 2017. Although DCFS was aware of Mother’s parents’ names,¹³ DCFS listed Mother’s mother as her grandmother and her father as her mother. DCFS provided no current, or former addresses for any of Mother’s relatives; no birth dates; no birth places; and no dates

¹³ DCFS stated in its jurisdiction/detention report, filed April 4, 2017, that “Rochelle G[.], the mother, was born and raised in Los Angeles, CA to the parents Mary Ann W[.] (maternal grandmother, MGM) and Keith C[.] G[.] (maternal grandfather, MGF).”

or places of death.¹⁴ Although Mother had told DCFS that her potential Blackfeet ancestry came through her father, DCFS listed every family member on both sides of the family as Blackfeet Tribe of Montana. This meant that the notice provided no way to identify which of A.O.'s relatives were actually thought to be related to the tribe.

DCFS's lack of investigation and its fragmentary ICWA notices meant that the jurisdictional hearing for A.O. could not take place as scheduled on July 10, 2017. The court postponed the hearing for three months so that DCFS could re-interview Mother, carry out its investigation, and issue new ICWA notices. DCFS, however, waited 50 days to re-interview Mother, necessitating another continuance of the jurisdictional hearing.

DCFS's investigation and notice preparation were again inadequate. According to DCFS's account of the August 29, 2017 re-interview, Mother said that her grandmother, Mary Ann W., may have Blackfeet ancestry. However, according to DCFS's previous reports, Mary Ann W. was Mother's mother; and Mother's Blackfeet ancestry was paternal. There is no indication in the record that DCFS attempted to resolve the question of how Mother and Mary Ann W. were related or to clarify which of Mother's relatives had possible Native American ancestry. DCFS's second round of ICWA notices in September 2017 were virtually identical to the first notices: Other than updating Mother's current address and listing Mother's father as Father's

¹⁴ DCFS's inquiry and reporting was similarly faulty with respect to Father—his parents were listed as his grandparents, and except for stating "Blackfeet Tribe of Montana" every single other box was filled with "Unknown"—but these errors are less consequential because Father denied Native American ancestry.

mother, the notices were unchanged. Additionally, DCFS failed to provide proof of delivery of the notices to the juvenile court.

At the October 10, 2017, hearing at which the court again continued the jurisdictional hearing because of DCFS's failure to comply with ICWA, the court ordered DCFS to submit a last minute information report regarding ICWA compliance prior to the November 15, 2017, jurisdictional hearing date. DCFS failed to do so.

Finally, DCFS made false representations to the juvenile court judge who conducted the post-disposition proceedings. In its May 2018 report, DCFS stated that on January 22, 2018, the court had ruled that ICWA did not apply. In its next report, the final status report prior to the termination of parental rights, DCFS asserted that ICWA did not apply. The record is devoid of any evidence to support these statements. Neither the reporter's transcript nor minute order from the January 2018 hearing contains any reference to ICWA, let alone any ruling on its applicability; and as a result of DCFS's inadequate investigation and notice preparation no competent determination could be made about ICWA's applicability. DCFS's misrepresentation that ICWA had been determined not to apply was particularly detrimental because it concealed from the judge new to the matter that no selection and implementation hearing could properly be conducted due to the unresolved ICWA issues. (25 U.S.C. § 1912(a) [termination of parental rights hearing may not be held until at least 10 days after proper notice].)

C. The Juvenile Court Failed to Ensure that Proper ICWA Notices Were Sent, and to Rule on the Applicability of ICWA

The initial juvenile court officers continued the jurisdictional hearing three times because DCFS had failed to comply with ICWA investigation and notice requirements and to gather the necessary information to permit the court to make an informed ruling on ICWA's applicability. However, when the juvenile court conducted the jurisdictional hearing in November 2017, it failed to address ICWA. At that hearing, the juvenile court should have ordered and ensured compliance with the notice provisions, and it also should have complied with all requirements of ICWA in conducting hearings until such time that it was determined that A.O. was not an Indian child or that she was an Indian child but her tribe declined to intervene in the juvenile court proceedings. "The juvenile court's failure to secure compliance with the notice provisions of the [ICWA] is prejudicial error." (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1424.)

D. The Matter Must Be Remanded, Further Delaying Permanency for A.O.

If DCFS and the juvenile court had ensured that proper ICWA notices were sent in March 2017, then her tribe, if any, would have learned of the dependency petition and could have intervened when A.O. was an infant and the proceedings had just begun; and further proceedings could have been undertaken in accordance with ICWA and California law. If accurate and complete notices had been sent at that time and the tribe had responded that it had determined that A.O. was not a member of, or eligible for membership in, the tribe, then the court could have

conducted the jurisdictional hearing in July 2017 instead of five months later.

This delay is significant. A.O.'s parents were denied reunification services under section 361.5, subdivision (b)(10) and (b)(11). Therefore, at disposition, the juvenile court elected to set the permanent plan selection and implementation hearing under section 366.26 in 120 days, as it was authorized to do by section 361.5, subdivision (f). If proper, complete ICWA notices had been issued in March 2017, the court could have conducted the jurisdictional hearing in July 2017, and it could have issued its dispositional orders setting the permanent plan hearing much earlier, moving the matter swiftly to protect A.O.'s "compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) But because of DCFS's failure to investigate and provide adequate notice, baby A.O. was still waiting for an adjudication hearing four months later, and her permanent plan selection and implementation hearing did not occur until almost exactly one year after the jurisdictional hearing was postponed in July 2017. Moreover, the court's failure to ensure compliance with ICWA and to ascertain ICWA's applicability requires us to vacate the termination of parental rights, meaning that A.O., who is now more than two and one-half years old, must await permanency even longer. (See 25 U.S.C. §§ 1912(a), 1914 [no termination of parental rights hearing may be held until at least 10 days after proper notice to potentially intervening tribes; failure to comply with ICWA's notice provisions is a ground for invalidating a termination of parental rights].)

We reverse the order terminating parental rights and remand for the juvenile court to order DCFS to, within 30 days of the remittitur, investigate thoroughly and expeditiously A.O.'s possible status as an Indian child; gather as much of the information required by ICWA and section 224.3, subdivision (a)(5) as is available; and send proper and correct ICWA notices consistent with the requirements of ICWA, the Welfare and Institutions Code, and California Rules of Court, rules 5.481 and 5.482. Proper notice under ICWA must include the petition and following information, if known: the child's name, birth date and birthplace; the name of the tribe in which the child is enrolled or may be eligible to enroll in; the names of the child's mother, father, grandparents, great-grandparents, and any Indian custodians; those individuals' maiden, married, and former names as applicable, their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses. (25 C.F.R. § 23.111.) This will ensure that the Bureau of Indian Affairs and the relevant tribe(s) have the opportunity "to investigate and determine whether the minor is an Indian child," and that any concerned tribe is advised "of the pending proceedings and its right to intervene." (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 470.)

DCFS shall notify the court of its actions and file certified mail return receipts for the ICWA notices sent, together with any responses received. The juvenile court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether A.O. is an Indian child. If the court finds she is an Indian child, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with

ICWA and related California law. If not, the court shall reinstate its section 366.26 order.

DISPOSITION

The order terminating parental rights under section 366.26 is reversed and the matter is remanded to the juvenile court with directions that within 30 days of the remittitur, pursuant to ICWA, the Welfare and Institutions Code, and rules 5.481 and 5.482 of the California Rules of Court, DCFS investigate and provide the appropriate tribes and the Bureau of Indian Affairs with proper notice of the pending proceedings.

DCFS shall notify the court of its actions and file certified mail return receipts for the ICWA notices sent, together with any responses received. The juvenile court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether A.O. is an Indian child. If the court finds she is an Indian child, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court shall reinstate its section 366.26 order.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.